RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*
CYRIL J. CURRAN, *Associate Editor.*

ADMIRALTY—MARITIME LIENS—SUPPLIES FURNISHED BY PART OWNER.—A stockholder and director of a steamship corporation furnished supplies to the company for use on one of its boats. *Held,* he is not entitled to a lien as against strangers who have liens on the vessel. *The Cimbria* (D. C. N. J. 1914) 214 Fed. 131.

Although a part owner of a boat is ordinarily not a partner but merely a tenant in common, Burdick, Partnership (2nd ed.) 26; *Ex parte Young* (1813) 2 Ves. & B. 242; *Petrie* v. *Steam Tug Coal Bluff No. 2* (D. C. 1880) 3 Fed. 531; *contra, Doddington* v. *Hallet* (1750) 1 Ves. Sr. *497, where circumstances appear showing that a partnership was actually intended, a partner has been accorded a maritime lien on the vessel. *Mumford* v. *Nicoll* (N. Y. 1822) 20 Johns. *611, *634. It has been intimated that a stockholder of a maritime corporation is a part owner of its vessels. See *The Queen of St. Johns* (C. C. 1886) 31 Fed. 24. This is obviously contrary to fact, and no reason can be assigned for refusing to allow a stockholder a lien on boats which he supplied relying thereon for compensation, although such boats were owned by the company. *The City of Camden* (D. C. 1906) 147 Fed. 847. Where, however, the stockholder is at the same time an officer or director of the corporation, knowledge of the condition of its affairs should preclude him from relying on the vessel rather than on the credit of the company, and he will accordingly be refused a lien. *The Murphy Tugs* (D. C. 1886) 28 Fed. 429; *The St. Joseph* (D. C. 1869) Fed. Cas. No. 12,229. It is difficult to see why this same reasoning should not be invoked to prevent the acquisition of a lien by a partner. Where the alleged lien of the stockholder conflicts with those of creditors of the corporation, as in the principal case, a court of admiralty, acting on equitable principles, see *Petrie* v. *Steam Tug Coal Bluff No. 2, supra,* is justified in postponing it until those creditors are satisfied. *The Murphy Tugs, supra.*

ATTACHMENT—PROPERTY IN ESTATE OF FOREIGN DECEDENT.—The plaintiff, a creditor of a foreign decedent, attached personal property which was situated in New York belonging to the estate. *Held,* the attachment should be vacated. *Bostwick* v. *Carr* (App. Div. 1914) 52 N. Y. L. J. 75. Not yet reported.

It has been established that an executor or administrator is not subject to attachment or garnishment proceedings in his representative capacity, at the suit of the decedent's creditors. *Matter of Hurd* (N. Y. 1833) 9 Wend. 465; *Jordan* v. *Landram* (1910) 35 App. D. C. 89. This is explained on the ground that such proceedings are an encroachment by the common law courts upon the prerogatives of the courts of probate and administration, which would tend to embarrass and delay the settlement of the decedent's estate. *Jordan* v. *Landram, supra.* It is also said that attachments are inconsistent with the fundamental principles of probate law, which contemplate equality of distribution and look with disfavor upon the establishment of a virtual preference in favor of any one creditor by means of the lien of an

attachment. *Levy* v. *Succession* (1886) 38 La. Ann. 9. In view of these objections to the levying of attachments upon the assets of a decedent's estate, the right to their institution should be denied in absence of express legislative provision authorizing their use, and since § 1836a of the New York Code of Civil Procedure, invoked in the principal case, which gives a cause of action against a non-resident executor and administrator as though they were ordinary non-residents, does not specifically provide for the bringing of execution or attachment proceedings against a personal representative, the court would appear to have decided correctly in vacating the attachment. Nevertheless, such proceedings are permitted in Kansas, where the statute is similar to that in the principal case. *Cady* v. *Bard* (1879) 21 Kan. 667. In Massachusetts and certain other jurisdictions attachment against the property of a decedent estate is specifically authorized by statute. See *Herthel* v. *McKim* (1906) 190 Mass. 522.

BANKRUPTCY—RIGHT OF TRUSTEE TO SELL FREE FROM THE DOWER INTEREST OF WIFE.—A trustee in bankruptcy, under order of the bankruptcy court, sold real estate free and discharged of all liens. It did not appear when the inchoate right of dower in the wife of the bankrupt attached. *Held,* such dower interest was not divested by the sale. *In re Chotiner* (D. C. Pa. 1914) 216 Fed. 916.

Under the Bankruptcy Acts of 1841 and 1898 the dower right of the wife is saved by express provisions, *Worcester* v. *Clark* (Pa. 1853) 2 Grant. 83; *In re Shaeffer* (D. C. 1900) 105 Fed. 352, and although these provisions were omitted from the act of 1867, it was held that dower was still unaffected on the ground that only such estate and rights as the bankrupt had passed to the trustee. *In re Angier* (D. C. 1871) 1 Fed. Cas. 914; *Porter* v. *Lazear* (1883) 109 U. S. 84. The Amendment of 1910, § 47a (2), however, provides that the trustee "as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." While the purpose of the amendment was primarily to give the trustee a valid title against a claim under an unrecorded conditional sale, it is not to be so limited in its application, see *In re Whatley Bros.* (D. C. 1912) 199 Fed. 326, and since in Pennsylvania the dower right of the wife is barred by a judicial sale of her husband's property, *Directors of the Poor* v. *Royer* (1862) 43 Pa. 146, it would seem that in that State, by virtue of the amendment, a sale by the trustee under order of the Bankruptcy Court should pass title free from the dower interest. *In re Codori* (D. C. Pa. 1912) 207 Fed. 784; *Matter of Freedman* (D. C. Pa. 1913) 31 Am. Bank. Rep. 53. It has been held, however, that the Amendment does not affect rights which were good against the trustee prior to its passage, *Arctic Ice Co.* v. *Armstrong Trust Co.* (C. C. A. 1911) 192 Fed. 114; *Holt* v. *Henley* (1914) 232 U. S. 637, and hence, if in the principal case the dower interest of the wife attached before the Amendment was passed, the result reached would seem justifiable.

CARRIERS—INJURY TO PERSONS ON TRACKS—IMPLIED LICENSEES.—Notices forbidding trespassing were posted on a railroad bridge, but they were constantly disregarded by the public. The plaintiff was struck by one of the defendant company's trains while walking over the bridge. *Held,* the jury might find that the company acquiesced in such user

and that, therefore, the person injured was a licensee. *Doyle* v. *Portland Ry. etc. Co.* (Ore. 1914) 143 Pac. 623.

Where the public has been accustomed to pass over the tracks of a railroad for a long period of time with the acquiescense of the railroad company, a license so to do may be implied; 8 Columbia Law Rev. 317; and in that event it has been held that the railroad company must use due care to protect such licensees. See p. 184, *infra*. This implication of acquiescence may be negatived, however, when it would be unreasonable to suppose that the company had given its assent. No license is to be implied, therefore, however frequent the custom might be, to pass underneath freight cars, *Central R. R. etc. Co.* v. *Rylee* (1891) 87 Ga. 491, or to cross a long narrow trestle so constructed that a person thereon could not step aside to avoid a train, *Texas Midland R. R.* v. *Byrd* (1909) 102 Tex. 263, since in both cases it would materially handicap the railroad in its movement of trains. On the other hand, merely posting signs forbidding the public to go upon railroad premises should not in itself convert their status of implied licensees to that of trespassers. *Missouri etc. Ry.* v. *Sharp* (Tex. 1909) 120 S. W. 263; but see *Lamb* v. *Southern Ry.* (1910) 86 S. C. 106. Signs forbidding trespassing are undoubtedly evidence of lack of acquiescence on the part of the railroad, but the weight of authority sanctions the view set forth in the principal case, that their effect may be entirely negatived by evidence of the fact that they were constantly disregarded without other objection by the railroad company. *O'Connor* v. *Boston etc. R. R.* (1883) 135 Mass. 352; *International etc. R. R.* v. *Brooks* (Tex. 1899) 54 S. W. 1056; *Great Northern R. R.* v. *Thompson* (C. C. A. 1912) 199 Fed. 395; *Dublin etc. Ry.* v. *Slattery* (1878) 3 App. Cas. 1155.

CARRIERS—INJURIES TO PERSONS ON TRACKS—TRESPASSERS AND LICENSEES.—While walking over a railroad bridge commonly used by the public, the plaintiff was struck by one of the defendant company's trains. *Held,* the plaintiff was a licensee and the railroad was bound to exercise ordinary care to discover him. *Doyle* v. *Portland Ry. etc. Co.* (Ore. 1914) 143 Pac. 623.

A railroad company has exclusive use of its property where it does not occupy a highway, and persons coming upon such property without permission, express or implied, are trespassers. See 10 Columbia Law Rev. 569. Generally the duty of a landowner to trespassers is merely negative, to refrain from wilfully inflicting injury upon them after learning of their peril. Burdick, Torts (3rd ed.) 518. In the case of a licensee, who takes the premises as he finds them, the only added duty of the landowner is to warn him of hidden dangers. Burdick, Torts (3rd ed.) 516. It is urged, therefore, that a licensee upon railroad property, since he cannot reasonably be unaware of the dangers of his position, should be required to look out for his own safety. 3 Elliott, Railroads (2nd ed.) § 1250. There are numerous cases, however, which require reasonable care on the part of the railroad company to discover persons upon its tracks, where because of constant use by the public such persons are said to be implied licensees. *Byrne* v. *New York Cent. etc. R. R.* (1887) 104 N. Y. 362; *Teakle* v. *San Pedro etc. R. R.* (1907) 32 Utah 276; *Thomas* v. *Chicago etc. Ry.* (1897) 103 Ia. 649. In other jurisdictions, upon humanitarian grounds, the courts require the railroad to exercise special care at points where it knows, or should know, that its right

of way is invaded by the public, whether persons injured at such points are to be regarded as trespassers or licensees. *Great Northern Ry.* v. *Thompson* (C. C. A. 1912) 199 Fed. 395; *Ahnefeld* v. *Wabash R. R.* (1908) 212 Mo. 280.

CONSTITUTIONAL LAW — CARRIERS — SEPARATE ACCOMMODATIONS FOR NEGROES.—A Separate Coach Law of Kentucky, prohibiting railroads from discriminating in the quality of accommodations in the cars set apart for white and colored passengers, contained no mandate as to the furnishing of privies upon passenger trains. The defendant was indicted because of differences in the conveniences of privies set apart for negroes. *Held,* the volume of negro traffic being comparatively light, and there being a substantial equality in accommodations, there was no discrimination. *Louisville & N. R. R.* v. *Commonwealth* (Ky. 1914) 170 S. W. 162.

A similar statute in Oklahoma further provided that the carrier could haul sleeping, dining and chair cars exclusively for white persons. *Semble,* the provision is offensive to the Fourteenth Amendment, the argument with respect to the volume of traffic being without merit. *McCabe et al.* v. *Atchison, T. & S. Fe. Ry. et al.* (U. S. Sup. Ct., October Term 1914. No. 15) Not yet reported.

Upon the theory that a carrier of passengers may make and enforce reasonable rules and regulations for the conduct of its business, it is well established that a carrier, independent of any statutory authority, may require colored persons, solely because of their color, to occupy compartments set apart for those of this race, provided, however, no discrimination be made in the quality of accommodations. *Bowie* v. *Birmingham Ry. etc. Co.* (1899) 125 Ala. 397; *West Chester etc. R. R.* v. *Miles* (1867) 55 Pa. St. 209; *Chesapeake etc. Ry.* v. *Wells* (1887) 85 Tenn. 613. And since the Fourteenth Amendment is prohibitory simply of state legislation, *Civil Rights Cases* (1883) 109 U. S. 3, this regulation does not contravene any constitutional provision and the question whether or not it abridges any privilege or immunities of citizens is not involved. *Chilton* v. *St. Louis & I. M. Ry.* (1892) 114 Mo. 88. The weight of authority, moreover, upholds even state statutes which require railroads to provide separate but equal facilities for white and colored persons, provided their operation be confined to intrastate commerce, *Chesapeake & O. Ry.* v. *Kentucky* (1900) 179 U. S. 388, on the ground that a State in order to preserve order and decorum may in the valid exercise of its police power make color alone a basis for classification. *Ex parte Plessy* (1893) 45 La. Ann. 80; *Plessy* v. *Ferguson* (1896) 163 U. S. 537; *Ohio Valley Ry's. Receiver* v. *Lander* (1898) 104 Ky. 431. Congress may, however, in granting a railroad permission to engage in interstate commerce, require as a condition precedent that colored persons be allowed to ride in the same cars as whilte persons. *Railroad* v. *Brown* (1873) 17 Wall. 445. Doubtless, whether or not the carrier shall provide particular facilities is conditioned upon there being a reasonable demand therefor, but since the statute in Oklahoma made no provisions at all for the accommodation of negroes, it is violative of the Fourteenth Amendment. *Cf. Chicago etc. Co.* v. *Williams* (1870) 55 Ill. 185.

CONSTITUTIONAL LAW—POWER OF CONGRESS TO PROTECT MIGRATORY BIRDS.—The migratory bird provision of the act of March 4th, 1913, c. 145, 37 U. S. Stat. L. 847, *held,* unconstitutional since it was not

passed in pursuance of the expressed or necessarily implied powers granted to Congress by the Constitution. *United States* v. *Shauver* (D. C. E. D. Ark. 1914) 214 Fed. 154.

It is well settled in this country, that the several States hold the game within their boundaries for the benefit of their citizens, and under the police power may regulate not only the manner in which such game may be taken, but also the nature of the property right acquired when taken. *Geer* v. *Connecticut* (1896) 161 U. S. 519; *State* v. *Rodman* (1894) 58 Minn. 393, 400; *American Express Co.* v. *People* (1890) 133 Ill. 649. The power so to do is not impaired even though such legislation may indirectly affect interstate commerce. *Geer* v. *Connecticut, supra; Silz* v. *Hesterberg* (1908) 211 U. S. 31. Since, then, migratory birds considered as game, come under the ownership of the several States, it is difficult to see how they can be a subject for congressional legislation under Art. 4, § 3, (2), giving the federal legislature power to enact laws for property belonging to the United States; and the argument that the migration of birds in itself constitutes interstate commerce is more ingenious than convincing. The court in overruling both of these arguments was undoubtedly correct on authority and also on principle, for beneficial and desirable as such legislation may be, it is now too well settled to admit of doubt, that Congress may exercise only such powers as are expressly granted in the Constitution or necessarily flow therefrom. See *Kansas* v. *Colorado* (1907) 206 U. S. 46, 87.

CONSTITUTIONAL LAW — TAXATION — MUNICIPAL FUEL YARDS.—The legislature authorized municipalities to tax inhabitants for the establishment and maintenance of a municipal fuel yard, after an affirmative vote upon the proposition by the inhabitants. *Held,* since the tax is for a public purpose, it is constitutional. *Laughlin* v. *City of Portland* (1914) 111 Me. 486. See Notes, p. 179.

CONTRACTS—ILLEGALITY—RELIEF.—The plaintiff, induced by fraudulent representations of the defendant, entered into an illegal contract looking to the control of a certain corporation and, pursuant to the agreement, conveyed real estate in part payment for shares of stock. He now seeks to have the deed of conveyance annulled. *Held,* in view of the public policy to thwart fraudulent promoting schemes, equity will afford relief to the plaintiff by ordering a reconveyance of title. *Gilchrist* v. *Hatch* (Ind. 1914) 106 N. E. 694. See Notes, p. 175.

CONTRACTS—PLEADING—AVERMENT AND PROOF OF COMPLIANCE WITH LAW.—A statute made it a misdeameanor for any person to practice architecture without a certificate. In an action upon contract for services rendered as an architect, it was not alleged or shown that the plaintiff had a certificate. *Held,* the defendant must plead and prove non-compliance with the statute to defeat recovery on that ground. *Harris* v. *Bucher* (Cal. 1914) 143 Pac. 796.

It is well settled that there can be no recovery by a plaintiff for goods sold or services rendered unless all occupational requirements intended to protect public interests have been satisfied. *Ferdon* v. *Cunningham* (N. Y. 1866) 20 How. Pr. 154; *Kenedy* v. *Schultz* (1894) 6 Tex. Civ. App. 461; *Murray* v. *Williams* (1904) 121 Ga. 63. But with reference to the question upon whom the burden of proving compliance or non-compliance rests, the authorities are in conflict. The majority of courts, while not expressly holding that compliance is an

essential element of the plaintiff's case, hold that where the acts are required by positive law, the omission of which would be a criminal offense, the presumption that they are accordingly performed makes a *prima facie* case for the plaintiff, and imposes on the defendant the burden of producing evidence of non-compliance. *Cather* v. *Damerell* (Neb. 1904) 99 N. W. 35; *Leggat* v. *Gerrick* (1907) 35 Mont. 91; but see *Lanzer* v. *Unterberg* (N. Y. 1894) 9 Misc. 210. Since proof of the services rendered in the principal case was sufficient to support the action at common law, and since recovery is denied to an unlicensed plaintiff, not because of any illegality inherent in the transaction, but on the ground of public policy, where non-compliance does not appear on the face of the complaint the fact that the plaintiff was unlicensed would be an affirmative defense to be pleaded and proved by the defendant, *Wilson* v. *Melvin* (1859) 79 Mass. 73; *Lyford* v. *Martin* (1900) 79 Minn. 243; *Webster* v. *Lamb* (1902) 15 S. Dak. 292; *contra, Adams* v. *Stewart* (1848) 5 Del. 144, unless the license is expressly made a condition precedent to plaintiff's right to sue. *Cooper* v. *Griffin* (1895) 13 Ind. App. 212; *Westbrook* v. *Nelson* (1902) 64 Kan. 436.

CONTRACTS—RESCISSION—INNOCENT MISREPRESENTATIONS.—Relying on and induced by the defendant's representations as to the financial condition of a corporation, the plaintiff purchased a large amount of its stock. These representations were, in fact, false, although the defendant believed them to be true. *Held,* equity will grant relief for such innocent misrepresentations by rescinding the executed contract. *Canadian Agency Ltd.* v. *Assets Realization Co. et al.* (N. Y. App. Div., 1st Dept. 1914) 52 N. Y. L. J. 1163.

It is well established that a contract induced by willful misrepresentations will be rescinded, the plaintiff's equity in such cases being the fraud practiced upon him by the defendant. Anson, Contracts (11th ed.) 217. Where the misrepresentations are innocently made, moreover, this fact will be a good defense to an action for specific performance. *Boynton* v. *Hazelboom* (Mass. 1867) 14 Allen 107. But where the contract is executed and affirmative relief is demanded, the grounds for equitable interference are not so clear. One reason is that it is inequitable to allow one to benefit by his false statements without which the contract would never have been formed, at least under the same terms. *Redgrave* v. *Hurd* (1881) L. R. 20 Ch. Div. 1; see *Spurr* v. *Benedict* (1868) 99 Mass. 463; *Hammond* v. *Pennock* (1874) 61 N. Y. 145, 152. Then, too, there is frequently only inadequate relief at law in an action for breach of warranty, because of the difficulty of assessing damages. Finally, a further equity may be found in the mutual mistake resulting from the misrepresentation, although such mutual mistake may not so destroy the subject matter of the contract, and thereby prevent a meeting of the minds, as to furnish in itself grounds for rescission. The principal case in allowing rescission furnishes a square holding on a principle often alluded to in this country by way of dictum, in cases, however, that nearly always are decided on other grounds. *Smith* v. *Richards* (1839) 13 Pet. 26; *Black* v. *Walton* (1877) 32 Ark. 321, 326; but see *Turner* v. *Ward* (1876) 154 U. S. 618. Furthermore, in granting relief, the court draws no distinction, as was formerly done between executory and executed contracts. See *Belknap* v. *Lealey* (1856) 14 N. Y. 143; *Matthey* v. *Wood* (Ky. 1876) 12 Bush. 293.

COURTS—JURISDICTION—ACTION CONCERNING LAND IN FOREIGN STATE.—Suit was brought in Maryland to recover damages for the negligent destruction by fire of some buildings and their contents in West Virginia. *Held,* the court had jurisdiction of so much of the action as related to the destruction of the contents of the buildings, but could not take cognizance of the destruction of the buildings themselves. *Potomac Milling & Ice Co.* v. *Baltimore & Ohio R. R.* (D. C. Md. 1914) 217 Fed. 665. See Notes, p. 169.

COVENANTS—COVENANTS RUNNING WITH THE LAND RELATING TO THINGS NOT IN ESSE—SPECIFIC PERFORMANCE.—The plaintiff's ancestors conveyed a right of way to a railroad company, which covenanted to erect and maintain a flag station, but did not mention assigns in the instrument. *Semble,* the covenant is specifically enforcible against the assignee of the railroad company. *Parrott* v. *Atlantic & N. C. R. R.* (N. C. 1914) 81 S. E. 348.

It was resolved in *Spencer's Case* (1583) 5 Co. *16a, that a covenant which touches and concerns the land but relates to a thing not *in esse,* will not run with the land unless assigns be named in the grant or demise. The reason for this somewhat arbitrary and metaphysical qualification is difficult to ascertain, see Platt, Covenants, 471, and the binding force of the rule has been further shaken by the suggestion that *Spencer's Case,* as actually decided, stands for the directly opposite proposition (1584) Moore 159, and that the resolution of Lord Coke upon this point, is, therefore, a mere dictum. *Minshull* v. *Oakes* (1858) 2 H. & N. *793. The rule has nevertheless been strictly followed in New York, *Thompson* v. *Rose* (N. Y. 1828) 8 Cow. 266; *Ovington* v. *Henshaw* (N. Y. 1905) 47 Misc. 167, affirmed 115 App. Div. 886, and in other jurisdictions of this country. *Maryland etc. R. R.* v. *Silver* (1909) 110 Md. 510. By the weight of American authority, however, the omission of the word "assigns" will not preclude the running of a covenant relating to things not *in esse,* provided the intent to bind grantees or assignees is otherwise shown in the grant or demise. *Sexauer* v. *Wilson* (1907) 136 Ia. 357; see *Masury* v. *Southworth* (1859) 9 Oh. St. 340. The point seems undecided in England where some judges have followed precedent, *Grey* v. *Cuthbertson* (1782) 2 Chit. 482; *Doughty* v. *Bowman* (1848) 11 Q. B. 444, while others have rejected the distinction as unsound. *Smith* v. *Arnold* (1700) 3 Salk. *4; *Minshull* v. *Oakes, supra.* The courts of equity, with their tendencies to break away from arbitrary technicalities, appear to have rejected the orthodox rule as well, *Kelly* v. *Nypano etc. R. R.* (1899) 23 Pa. Co. Ct. 177, in accordance with the principal case.

CRIMINAL LAW—PLEADING AND PRACTICE—INSTRUCTING JURY AS TO PENALTY.—On a trial for murder, the judge charged the jury as to the punishment for first degree murder, but not as to that for second degree murder and manslaughter. The jury convicted of second degree murder. Under the rule of the jurisdiction, punishment was fixed by the court. *Held,* while the trial court may instruct the jury as to the penalty, failure to do so is not error. *State* v. *Inlow* (Utah 1914) 141 Pac. 530.

Where statutes give the jury power to assess punishment for a crime, it is necessary for the judge to instruct the jury as to the possible punishment which the law prescribes, *People* v. *Sainz* (1912)

162 Cal. 242, but where the court imposes the penalty, which is the usual situation, no such necessity appears. *People* v. *Ryan* (N. Y. 1889) 55 Hun 214; *Caudill* v. *Commonwealth* (1913) 155 Ky. 578. It is intimated in the principal case, however, that such instructions may be desirable in order to induce the jury, in considering the evidence, to exercise care commensurate with the severity of the consequences of conviction. If this is done, however, the jury may use its knowledge of the penalty to adapt its verdict to what it deems adequate punishment for the defendant, thereby perverting its duty to determine merely the fact of guilt or innocence, and to that extent making the penalty for crime dependent upon the will of the jury, instead of the legislature. See *Bliss* v. *State* (1903) 117 Wis. 596; *State* v. *Garrison* (1911) 59 Ore. 440. The jury should not convict or acquit on the basis of the lightness or severity of the authorized punishment, *State* v. *Peffers* (1890) 80 Ia. 580; *Ford* v. *State* (1895) 46 Neb. 390, and the possibility of compromise verdicts have led some courts to declare instructions as to punishment reversible error. *Commonwealth* v. *Switzer* (1890) 134 Pa. 383; *Ellerbe* v. *State* (1901) 79 Miss. 10. Whatever may be said as to the policy of such instructions, the decision in the principal case seems sound, that failure to give such instructions is not error. *Johnson* v. *State* (1900) 78 Miss. 627; *Williams* v. *People* (1902) 196 Ill. 173.

CRIMINAL LAW—PRESENCE OF DEFENDANT AT RENDITION OF VERDICT—WAIVER.—Counsel, without the defendant's knowledge or consent, waived his presence at the reception of the verdict. The defendant later made a motion for a new trial, which did not contain this fact as a ground for new trial. *Semble,* that this amounted to such an acquiescence in the waiver by counsel as to preclude its use as a basis for a subsequent motion to set aside the verdict as unconstitutional. *Frank* v. *State* (Ga. 1914) 83 S. E. 645. See Notes, p. 166.

DIVORCE—RIGHT TO TRIAL BY JURY—WAIVER.—A motion to have the issue of adultery in a divorce suit tried by a jury was made more than 20 days after issue joined. *Held,* the motion should be granted, since Rule 31 of the General Rules of Practice, in so far as it provides that the right to trial by jury is waived unless the motion be made within 20 days after issue joined, is invalid. *Moot* v. *Moot* (N. Y. 1914) 83 Misc. 495, affirmed (N. Y. App. Div. 3rd Dept.) 149 N. Y. Supp. 901.

The New York Constitution, Art. 1, § 2, provides that, "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," but "may be waived * * * in all civil cases in the manner to be prescribed by law." This positive right to trial by jury extends to the issue of adultery in divorce proceedings. Code Civ. Proc. § 1757; *Conderman* v. *Conderman* (N. Y. 1887) 44 Hun 181. The Code, § 1009, provides that the right may be waived in one of several ways, but in that statute there is no time limit set for the making of the motion for a jury trial. Under the same constitutional and code provisions, but before Rule 31 was formulated as it now stands, the motion to have the issue of adultery tried by a jury could be made at any time before trial, unless waived under § 1009 of the Code. *Wilcox* v. *Wilcox* (N. Y. 1906) 116 App. Div. 423; see dissent in *Cohen* v. *Cohen* (N. Y. 1914) 160 App. Div. 240. Thus the rule, by setting a time limit for making the motion, attempts to alter a

constitutional right, which it may not do. *Rice* v. *Ehele* (1874) 55 N. Y. 518; *Glenney* v. *Stedwell* (1876) 64 N. Y. 120. And inasmuch as the limitation in the rule adds to § 1009 of the Code, one more manner in which the party forfeits his right to a jury trial, it also violates the provision of the statute that gave authority to enact the General Rules of Practice which expressly states that none of the rules shall be contrary to the Code of Civil Procedure. § 94 Judiciary Law, ch. 30, Consolidated Laws. Accordingly the rule has been unanimously held invalid in the Second Department, *Halgren* v. *Halgren* (N. Y. 1914) 160 App. Div. 477, which decision with that in the principal case represents a more just and logical view than that adopted by the First Department in *Cohen* v. *Cohen, supra.*

ELECTIONS—FILING FEES—CONSTITUTIONALITY.—A candidate for the office of Secretary of State refused to pay the filing fee for nominations, claiming that the statute requiring such fees was unconstitutional. In mandamus proceedings to compel the Secretary of State to file the papers, *held,* that the requirement of a fee of $100. is not unreasonable nor does it impose a property qualification to hold public office. *State ex rel. Riggle* v. *Brodigan* (Nev. 1914) 143 Pac. 238.

The legislature, except as restricted by the Constitution, has the right to name qualifications for public office. See 10 Columbia Law Rev. 350. Some legislatures, in order to prevent an indiscriminate scramble for office, have required that candidates pay filing fees of more than a nominal sum. The courts of some jurisdictions have held such legislation a valid exercise of this power, and have declared that it does not impose a property qualification on the right to hold office. *State* v. *Scott* (1906) 99 Minn. 145; *Socialist Party* v. *Uhl* (1909) 155 Cal. 776. Such statutes do, however, make the ability to pay money a prerequisite, and they would therefore seem to affix a property qualification, *Ledgerwood* v. *Pitts* (1909) 122 Tenn. 570; *People* v. *Election Commissioners* (1906) 221 Ill. 9, and impair the right of the electorate to choose its candidates. *State* v. *Drexel* (1905) 74 Neb. 776. A filing fee should be uniform and nominal, and its only purpose should be to pay for the service of filing records. *Ballinger* v. *McLaughlin* (1908) 22 S. D. 206. When substantial fees are imposed to help defray election expenses, it is on the theory that those who seek the benefits must reimburse the State; *State* v. *Nichols* (1908) 50 Wash. 508; see *Kenneweg* v. *Allegany County* (1905) 102 Md. 119; but an unreasonable burden is thus placed upon candidates who do not seek office for personal advantage but rather to benefit the State. *Johnson* v. *Grand Forks County* (1907) 16 N. D. 363. Fees of more than nominal amounts are furthermore contrary to public policy inasmuch as they discourage and eliminate all effort by minority parties and thus place complete governmental power in the dominant party. *Johnson* v. *Grand Forks County, supra.*

EVIDENCE—DECLARATIONS—ALIENATION OF AFFECTIONS.—In an action against the plaintiff's father-in-law for alienating the affections of the plaintiff's wife and enticing her away, the defendant offered in evidence a letter written by the plaintiff's wife to her mother before the abandonment, charging mistreatment by the plaintiff and stating that she intended to leave him. *Held,* the letter should have been admitted in evidence. *Willey* v. *Howell* (Ky. 1914) 169 S. W. 519.

In actions for the alienation of affections, where the state of mind

of one of the parties becomes a material fact to be ascertained, the declarations, either oral or written, of such party, if made at a time when there was no motive to deceive, are admissible as evidence of such state of mind. *Luick* v. *Arends* (1911) 21 N. Dak. 614; *Ickes* v. *Ickes* (1912) 237 Pa. 582; *Roesner* v. *Darrah* (1902) 65 Kan. 599. Although this rule has sometimes been confused with the doctrine of *res gestae*, *Kidder* v. *Lovell* (1850) 14 Pa. 214; *cf. Hardwick* v. *Hardwick* (1906) 130 Ia. 230, declarations of intent, motive, feeling, etc., properly regarded, are independent of the *res gestae* doctrine and constitute, in themselves, a separate exception to the Hearsay Rule. 3 Wigmore, Evidence, § 1726 (2); *Commonwealth* v. *Trefethen* (1892) 157 Mass. 180; *Ickes* v. *Ickes, supra.* Such declarations, however, cannot be used as evidence of other matters therein recited. As to these, they are mere hearsay, and the trial judge should instruct the jury that their probative value must be strictly limited to the state of mind of the party at the time of uttering the declaration. *Ickes* v. *Ickes, supra*; *Luick* v. *Arends, supra*; *Leucht* v. *Leucht* (1908) 129 Ky. 700. The principal case has been criticized as holding that the letter in question should have been admitted as evidence of the acts therein alleged. See 79 Cent. L. J. 340. All that it actually decides is that the complete exclusion of the letter was reversible error, a result which is manifestly sound. The real issue is shown to depend upon the wife's state of mind and the greater part of the decision is devoted to the relevancy of the letter on that issue. The so-called dictum near the end of the decision is really but a terse summing up of the unquestionably correct conclusion of the preceding reasoning.

EVIDENCE—TESTIMONY OF ACCOMPLICE—DETECTIVES.—Special agents of the Excise Commissioner induced the defendant hotel keeper to sell liquor to them on Sunday in violation of the Liquor Tax Law. The defendant claimed that the agents were accomplices and that their testimony must be corroborated to warrant conviction. *Held,* the agents were not accomplices. *Farley* v. *Bronx Bath & Hotel Co.* (1914) 148 N. Y. Supp. 579.

At common law the testimony of an accomplice need not be corroborated, but it was a rule of practice for the courts to caution the jury as to the effect to be given to such evidence. *Commonwealth* v. *Wilson* (1890) 152 Mass. 12; *Commonwealth* v. *Klein* (1910) 42 Pa. Super. Ct. 66; *Collins* v. *People* (1881) 98 Ill. 584. In New York and in many other States, however, corroboration is required by statute. See N. Y. Code Crim. Proc., § 399. A detective, acting in good faith may at times aid and counsel criminals in their plans for the commission of crime, but since he has no criminal purpose, his testimony is not governed by the same rule as that of an accomplice. *Commonwealth* v. *Wasson* (1910) 42 Pa. Super. Ct. 38; *Regina* v. *Mullins* (1848) 3 Cox C. C. 526; *Campbell* v. *Commonwealth* (1877) 84 Pa. 187. When artifices are adopted for the purpose of detecting persons suspected of violating the Liquor Law, even though the detective's acts may be said to induce, to some extent, the particular act for which conviction is sought, it appears that a detective, acting in good faith will not be regarded as an accomplice. *Salt Lake City* v. *Robinson* (Utah 1912) 125 Pac. 657; but see *Ford* v. *Denver* (1898) 10 Col. App. 500. In such cases, moreover, the statutes are directed against the seller and not against the purchaser of liquor. *Lyman* v. *Oussani* (1900) 68 N. Y. Supp. 450; *Commonwealth* v. *Willard* (1839)

39 Mass. 476; *State* v. *Baden* (1887) 37 Minn. 212. But while the evidence of a detective does not have to be corroborated, it is within the discretion of the court to give cautionary instructions as to its credibility. *O'Grady* v. *People* (1908) 42 Col. 312; *Salt Lake City* v. *Robinson, supra.*

EXTRADITION—HABEAS CORPUS—INTERSTATE RENDITION.—In 1908 Thaw was acquitted in New York of the charge of homicide, on the ground of insanity, and was, under statutory authority, committed to the State Asylum for the Criminal Insane. In 1913 he escaped, was found in New Hampshire, and upon requisition of the governor of New York, the governor of New Hampshire issued a warrant for his arrest and rendition. On habeas corpus to test the validity of his detention, *held,* he was properly detained, and should be surrendered. *Ex parte Thaw* (U. S. Sup. Ct., October Term 1914. No. 514) Not yet reported.

For a discussion of this case in the United States District Court, criticising the decision of that court and reaching the same result as was reached in the principal case, see 14 Columbia Law Rev. 665.

INFANTS—DEPENDENT CHILDREN—MARRIAGE.—The juvenile court was by statute given jurisdiction over "dependent minor children under 18 years of age who habitually resort to any place where intoxicating liquors are sold." A girl of 17 whose marriage to a person of full age had been annulled, sang in a cafe. *Held,* she was within the jurisdiction of the juvenile court in spite of a statute which declared that "all females married to a person of full age shall be deemed and taken to be of full age." *In re Lundy* (Wash. 1914) 143 Pac. 885.

A minor may be emancipated by the act of his parent, *Robinson & Co.* v. *Hathaway* (1898) 150 Ind. 679, or by his marriage, *Bucksport* v. *Rockland* (1868) 56 Me. 22; see *State* v. *Lowell* (1899) 78 Minn. 166, and he thereby acquires freedom from parental control, *State* v. *Lowell, supra,* and a right to his earnings as against his parent, *Robinson* v. *Hathaway, supra.* But in the absence of statute he remains a minor, though emancipated, and acquires no political or municipal rights thereby. *Taunton* v. *Plymouth* (1818) 15 Mass. 203. Since a statute removing the disabilities of infancy is in derogation of the common law, it must be strictly construed. *Burr* v. *Wilson* (1857) 18 Tex. 367. For this reason the court, in the principal case, refuses to read into the statute of emancipation the words "for all purposes", and in effect reads into it "for certain purposes only". It would seem more reasonable to suppose that if the legislature had intended to limit the statute as suggested by the court, it would have specified for what purposes the woman was to be deemed of full age. As it is, it is difficult to see how one who "is to be deemed and taken to be of full age" can be a "minor dependent child". *Cf. Magee* v. *Welsh* (1861) 18 Cal. 156; *Ward* v. *Laverty* (1886) 19 Neb. 229; *Burr* v. *Wilson, supra,* p. 367. The court regards the annullment of the marriage as unworthy of discussion, but the decision could have been based with perfect soundness on this fact alone, rather than upon such a strained construction of the statute.

LIENS—PRIORITY—JUDGMENT LIENS ON REAL ESTATE.—An undivided share in certain real estate came by descent to one against whom several judgments had at different times before that been docketed.

Execution was issued upon one of the judgments and a sale had thereunder during the pendency of a suit to partition the land. *Held,* the purchaser under such execution sale is entitled to priority over the other judgment creditors in the distribution of the debtor's share of the proceeds of the partition sale. *Hulbert* v. *Hulbert* (N. Y. 1914) 86 Misc. 662. See Notes, p. 173.

MARTIAL LAW—POWERS OF MILITARY AUTHORITIES—TRIAL OF CIVILIAN BY COURT-MARTIAL.—After a declaration of martial law, the petitioner was detained by the militia to prevent his aiding the rioters, and was then tried by court-martial and sentenced to imprisonment. On an application for a writ of habeas corpus, *held,* that under a declaration of martial law the military authorities have power to detain suspects to prevent their fomenting disorder, but courts-martial have no jurisdiction to try civilians for any crime. *Ex parte* McDonald (Mont. 1914) 143 Pac. 947. See Notes, p. 177.

PLEADING AND PRACTICE—RESIDENCE—SECURITY FOR COSTS.—The plaintiff commenced an action in Nassau County and was at that time a resident of and domiciled in that county. Thereafter he closed his house and travelled from place to place on business, without establishing a residence at any particular place. *Held,* he is not a non-resident for the purpose of compelling him to give security for costs under § 3269 of the New York Code of Civil Procedure. *Ball* v. *Randall* (N. Y. 1914) 87 Misc. 194.

Whether one is a resident of a given place depends upon the purpose of the particular legislative classification under discussion. 12 Columbia Law Rev. 461. In attachment cases, the issuance of the warrant is governed by the accessibility of the defendant to personal service. Accordingly, although he is actually domiciled in the State, if he is absent therefrom at the time, since he is not then amenable to process, it seems that the warrant should issue even if he has not acquired a residence elsewhere. *Hanover Nat. Bank* v. *Stebbins* (N. Y. 1893) 69 Hun 308. This result is codified in the New York Code of Civil Procedure, § 636 (2), which declares that "where the defendant * * * has been without the State * * * for more than six months", a warrant of attachment is authorized. Following the same reasoning, it is held that a warrant of attachment, issued against a non-resident defendant who may be found in the State, will be vacated, since he is amenable to personal service. *Irwin* v. *Raymond* (N. Y. 1908) 58 Misc. 319. The purpose of providing for security for costs, on the other hand, is to protect a defendant from a plaintiff who resides in another State or county, and is accorded the privilege of using the courts of the State or county in which the defendant resides. A construction of the words "cease to be a resident" in such statutes to mean "be absent from", would disregard the object of the statute, for it would then apply to a resident who, during the pendency of an action, should leave the State or county for no matter how short a period of time. The decision in the principal case follows logically from this line of reasoning and is also supported by authority. *Taylor* v. *Norris* (N. Y. 1905) 104 App. Div. 21. Cases involving the suspension of the Statute of Limitations also construe the words "non-resident" to mean one who has actually acquired a residence elsewhere. *Pells* v. *Snell* (1889) 130 Ill. 379; *Hart* v. *Kip* (1896) 148 N. Y. 306.

PUBLIC SERVICE COMPANIES—WATER COMPANY—REGULATIONS.—A water company adopted a rule by virtue of which the company turned off the water for non-payment of water rents and, for the expense thereby involved, required payment of a charge of one dollar before renewing service. *Held,* although the regular water rents reached the maximum rate permissible under the company's franchise, this additional charge was valid because it was not imposed for service contemplated by the franchise. *Sei* v. *Water Supply Co.* (N. M. 1914) 140 Pac. 1067.

A water company may make reasonable regulations pertaining to the use of its water supply, and may enforce such rules by shutting off the water. *Shiras* v. *Ewing* (1892) 48 Kan. 170; *Heironymous Bros.* v. *Bienville etc. Co.* (1901) 131 Ala. 447. The company may require payment of the water rent at a stated period as a condition precedent to the continuation of its service, *Tacoma Hotel Co.* v. *Tacoma etc. Co.* (1891) 3 Wash. 316, but the regulation cannot be used to make the water company the judge of its own case to enforce payment of disputed bills, *Spaulding Mfg. Co.* v. *Grinnell* (1912) 155 Ia. 500; *Birmingham Water Works Co.* v. *Keiley* (1911) 2 Ala. App. 629, and, if the charge so enforced has not lawfully accrued, the consumer's rights may be protected by injunction or mandamus. *Poole* v. *Paris Mountain Water Co.* (1908) 81 S. C. 438; *Cromwell* v. *Stephens* (N. Y. 1867) 2 Daly 15. The imposition of a charge for turning the water off and on has sometimes been held unreasonable, *American Water Works Co.* v. *State* (1895) 46 Neb. 194, but it would seem that if such charge fairly represents the expense of the service rendered it should be allowed, *Mansfield* v. *Humphreys Mfg. Co.* (1910) 82 Oh. 216; see *Appeal of Brumm* (Pa. 1888) 12 Atl. 855; *cf. Royal* v. *Mayor of Cordele* (1909) 132 Ga. 125, and at least one jurisdiction permits a penalty charge for non payment of rent. *Girard Life Ins. Co.* v. *Philadelphia* (1879) 88 Pa. 393; *cf. Bower* v. *United Gas Improvement Co.* (1908) 37 Pa. Super. Ct. 113. Although the franchise of the company in the principal case provided a maximum rate for water rent, it seems reasonable to regard the extra charge as incurred by the consumer's own fault and not as part of the water rent within the meaning of the franchise.

REAL PROPERTY—ESTOPPEL OF GRANTEE TO DENY GRANTOR'S TITLE.—A granted land to the defendant on the collateral limitation that it be used for railroad purposes, and subsequently A's heirs, alleging a breach, sought to establish their title by virtue of their possibility of reverter. The railroad disproved the breach, set up a title acquired by absolute conveyance from one claiming adversely to A, and sought to have the cloud of A's possibility of reverter removed. *Held,* the railroad is estopped from denying the title of A, its grantor. *Stevens* v. *Galveston, H. & S. A. Ry.* (Tex. 1914) 169 S. W. 644.

The estoppel of a lessee to deny his lessor's title is universally recognized. This estoppel was thought by early writers to be by deed, 10 Viner, Abridgment 460, and sometimes said to arise from subinfeudation, *Merryman* v. *Bourne* (1869) 76 U. S. 592, but it is now generally held to depend on the fact that the lessee has taken possession which he must restore to his lessor, and that it is unjust for him to take advantage of possession so acquired to place upon his lessor the heavy burden of establishing his action to recover the property. See *Tilyou* v. *Reynolds* (1888) 108 N. Y. 558; 2 McAdam, Landlord & Tenant (4th ed.) 1445. Since a grantee in fee simple

absolute holds adversely to his grantor such estoppel manifestly does not apply to him, *Casey's Lessee* v. *Inloes* (Md. 1844) 1 Gill 430, 493; *Sparrow* v. *Kingman* (1848) 1 N. Y. 242; *Patterson* v. *Johnson* (1885) 113 Ill. 559, although a few courts with little or no reasoning have declared such grantee estopped. *Gill* v. *Fauntleroy's Heirs* (Ky. 1847) 8 B. Mon. 177, 184; *Curlee* v. *Smith* (1884) 91 N. C. 172; *Muller* v. *Hoth* (1902) 110 La. 105. But where there is the obligation to restore a possession at some future time the reasons for estopping a lessee would appear to apply with equal force to a grantee, *Blight's Lessee* v. *Rochester* (1822) 20 U. S. 535; *Osterhout* v. *Shoemaker* (N. Y. 1842) 3 Hill 513; *Robertson* v. *Pickrell* (1883) 109 U. S. 608, and therefore, it would seem sound to hold the grantee estopped where, as in the principal case, the grantor retains a possibility of reverter or right of reentry. *O'Brien* v. *Wetherell* (1875) 14 Kan. 616; *Cowell* v. *Springs Co.* (1879) 100 U. S. 55; *Kelso* v. *Stigar* (1892) 75 Md. 376.

SALES—CONDITIONAL SALES—WAIVER OF RESERVATION OF TITLE BY TAKING NEW SECURITY.—The plaintiff took notes for the purchase price of an automobile, reserving title in himself until payment. When the notes matured, he accepted a renewal note with an additional indorser, not expressly continuing the reservation of title. *Held,* the plaintiff's rights under the original conditional contract were not divested by taking the subsequent security. *McDonald Auto Co.* v. *Bicknell* (Tenn. 1914) 167 S. W. 108.

In a contract of conditional sale by which the vendor reserves title until payment of the purchase price, the taking of a note by the vendor for the price or as a renewal of former notes, in the absence of an agreement that it is given in payment or discharge of the pre-existing indebtedness, operates only as an extension of the time of payment, and the vendor is not to be deemed to have waived his reservation of title. *National Cash Register Co.* v. *Riley* (1909) 23 Del. 355; *Beall* v. *Hudson etc. Co.* (1911) 185 Fed. 179. Nor does the sale become absolute where the notes are secured by a mortgage or other collateral security, *Pettyplace* v. *Manufacturing Co.* (1894) 103 Mich. 155; *Monitor Drill Co.* v. *Mercer* (C. C. A. 1908) 163 Fed. 943; *contra, Silver Bow etc. Co.* v. *Lowry* (1887) 6 Mont. 288, nor where, as in the principal case, additional indorsement on renewal notes are obtained. *Laundry* v. *Dole* (1900) 22 Utah 311. In cases where a mortgage has been given by the vendee covering the property which is the subject of the sale, some courts have taken the view that the vendor, by accepting it, necessarily recognizes title in the vendee, and that the sale becomes absolute, notwithstanding the express reservation, *Thornton* v. *Findley* (1911) 97 Ark. 432; see *American Soda Fountain Co.* v. *Blue* (Ala. 1906) 40 So. 218, affd. 150 Ala. 166, but the majority view is that the mortgage is accepted merely as additional security, and that no waiver of the conditional agreement by the vendor is to be implied. *Page* v. *Edwards* (1891) 64 Vt. 124; *Bierce* v. *Hutchins* (1906) 205 U. S. 340; *Champenois* v. *Tinsley* (1907) 90 Miss. 38.

SET-OFF AND COUNTERCLAIM—PAYMENT UNDER CONTRACT—AFTER ASSIGNMENT.—In a contract of rescission between D and G, its subcontractor, G transferred its rights to certain forms of D and agreed to pay rent on these forms in the future. D agreed to pay a balance of $20,000 by three promissory notes for $5000 each, the remaining $5000

to be held for one year as security against any liens or claims by the State against G. During the year G assigned his right in the $5000 to the plaintiff. Later, G having failed to pay the rent, the owner of the forms replevied them. The plaintiff sues for the $5000 and D sets off his damage from G's breach of the agreement to pay rent on the forms. *Held,* this set-off should be allowed. *National Nassau Bank of New York* v. *Ludington's Sons Inc.* (N. Y. App. Div. 1914) 149 N. Y. Supp. 967.

Any matter of set-off against an assignee arising from a contract separate from the one on which the plaintiff bases his claim must have been due and payable at the time of the assignment. N. Y. Code Civ. Proc. §§ 501, 502; *Fera* v. *Wickham* (1892) 135 N. Y. 223; *Michigan Savings Bank* v. *Millar* (N. Y. 1906) 110 App. Div. 670; *Callanan* v. *Edwards* (1865) 32 N. Y. 483; Pomeroy, Code Remedies (4th ed.) § 92. But if the cross demands arise from the same contract or transaction the case falls within § 501 of the Code, exclusive of subdivision 2, which provides that such claims may be set-off. The New York courts have somewhat confused this distinction by holding that different parts of a severable contract are to be regarded as separate contracts; *Siebert* v. *Dunn* (N. Y. 1913) 157 App. Div. 387; but in that decision the court was probably influenced by the great length of time over which the contract extended. The $5000 due in the principal case was in fact a balance due under the contract. The beneficial interest under a contract may be assigned and the assignee is entitled to collect the sum due when the assignor has earned it, 15 Columbia Law Rev. 70; *Rodgers* v. *Torrent* (1897) 111 Mich. 680, but the assignor in the principal case had not become entitled to the money, since the defendant's set-off would unquestionably have been good against him. To disallow this set-off against the assignee would be, in effect, to allow the beneficial interest of contracts to be so separated from the obligations thereunder as to force the obligor to pay for something he had not received and might never receive. *Government of New Foundland* v. *New Foundland Ry. Co.* (1888) 13 App. Cas. 199.

SHERMAN ANTI-TRUST ACT—COMMERCE WITH FOREIGN NATIONS—FIGHTING SHIPS.—The defendants, who operated steamship lines engaged in commerce with foreign nations, combined to divide the traffic so as to allot proportionate shares thereof among formerly competing concerns. They employed only such agents as would sell no passenger tickets other than those of the defendants, and sent out "fighting ships", instituted for the sole purpose of stifling outside competition. In a suit in equity by the United States under the Anti-Trust Act, *held,* the use of "fighting ships" should be enjoined, but a decree of dissolution should not issue. *United States* v. *Hamburgh-American S. S. Line* (D. C. S. D. N. Y. 1914) 216 Fed. 971.

Although most of the decisions under the Sherman Anti-Trust Act have concerned commerce among the States, the provisions of the Statute, in accordance with the constitutional power of Congress, refer specifically to foreign commerce as well, and there is, therefore, no occasion for varying the interpretation of the Act in reference to commerce with foreign nations. *United States* v. *Hamburgh etc. Gesellschaft* (C. C. 1911) 200 Fed. 806; *Thomsen* v. *Union Castle Mail S. S. Co.* (C. C. A. 1908) 166 Fed. 251. The fact that the combination was formed in a foreign country is immaterial, so long as it directly affects the foreign commerce of the United States. See *Thomsen* v. *Union Castle Mail S. S. Co., supra.* A contract for the

use of "fighting ships", whether or not enforcible between the parties at common law, was not illegal so as to give a cause of action to a third party injured by their use. *Mogul S. S. Co.* v. *MacGregor* L. R. [1892] App. Cas. 25. Nevertheless, since the prohibitions of the Sherman Act extend to all agreements unenforcible at common law, *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1; *cf. Atty. Gen.* v. *Adelaide S. S. Co., Ltd.*, L. R. [1913] App. Cas. 781, 801, or even further, see 14 Columbia Law Rev. 659, the injunction restraining the use of "fighting ships" was clearly justified. Since, however, the defendants in the principal case suppressed competition among themselves by means of traffic agreements, *cf. United States* v. *Joint Traffic Assn.* (1898) 171 U. S. 505, and also maintained their combination by employing only such agents as would deal with no other concerns, *cf. Montague* v. *Lowry* (1903) 193 U. S. 38; *Continental etc. Co.* v. *Voight* (1908) 212 U. S. 227, (C. C. A. 1906) 148 Fed. 239, 247, the refusal of the court to issue a decree of dissolution, or to afford some similar adequate remedy, would appear unjustified. See 14 Columbia Law Rev. 659. Benefit to the public by virtue either of a lowering of prices or of more satisfactory service, does not render an agreement any more reasonable, so as to absolve from prosecution a defendant otherwise offending against the provisions of the Act. See *United States* v. *Trans-Missouri Freight Assn.* (1896) 166 U. S. 290; *United States* v. *Chesapeake etc. Co.* (C. C. 1900) 105 Fed. 93, affirmed (C. C. A. 1902) 115 Fed. 610.

SUBROGATION—PURCHASER OF INCUMBERED ESTATE ASSUMING THE INCUMBRANCE—EFFECT OF NOTICE—FRAUD.—A purchaser from a fraudulent grantor, having constructive though not actual notice that the conveyance to his grantor was in fraud of a judgment creditor having a lien on the land, discharged a first mortgage which he had assumed. *Held,* as against the judgment creditor he was entitled to be subrogated to the lien of the first mortgage. *Tibbetts* v. *Terrill* (Colo. 1914) 140 Pac. 936. See Notes, p. 171.

TORTS—UNFAIR COMPETITION—COPYING ARTICLES IN WHOLE OR IN PART.—The defendant bought toy animals from Bing which were minutely copied from toy animals long manufactured by the plaintiff. *Held,* since the manufacturer of these toys had, on the ground of unfair competition, been restrained from continuing to make them, the court would also restrain their sale by the defendant. *Steiff* v. *Gimbel Bros.* (C. C. A. 1914) 214 Fed. 569.

For one person to make goods in such a way that the average purchaser is deceived into thinking that they are the goods of another is to trespass on the business good will of another by depriving him of a customer's trade to which he has a right, protected by law against unfair competition. See *Coats* v. *Merrick Thread Co.* (1893) 149 U. S. 562; *Reddaway* v. *Banham,* L. R. [1896] App. Cas. 199; *Fox.* v. *Glynn* (1906) 191 Mass. 344. In an action to prevent such interference with his business, the plaintiff must first show that he has established a demand on the part of the public for his goods. See *Rice & Co.* v. *Redlich Mfg. Co.* (C. C. A. 1913) 202 Fed. 155, 156. It must then be proven that the ordinary purchaser has been deceived or that he would be deceived into thinking that the defendant's goods were really of the plaintiff's make. See *Fischer* v. *Blank* (1893) 138 N. Y. 244; *Von Mumm* v. *Frash* (C. C. 1893) 56 Fed. 830; *Hill Bread Co.* v. *Goodrich Baking Co.* (N. J. 1913) 89 Atl. 863. The deceit in these cases may consist in exactly copying the plaintiff's goods, *Dutton* v. *Cupples* (N. Y. 1907) 117 App. Div. 172; *Enterprise*

Mfg. Co. v. *Landers* (C. C. A. 1904) 131 Fed. 240, but this copying may be excused on the grounds that the nature of the article requires the use of a certain form. *Marvel Co.* v. *Pearl* (C. C. A. 1904) 133 Fed. 160; *Diamond Match Co.* v. *Saginaw Match Co.* (C. C. A. 1906) 142 Fed. 727. Again, if the defendant's goods show in the ensemble a strong resemblance to those of the plaintiff, a case of unfair competition is made out. *Victor etc. Co.* v. *Armstrong* (C. C. 1904) 132 Fed. 711; *Fox* v. *Glynn, supra; Fischer* v. *Blank, supra.* And when the defendant copies unessential and non-functional features, courts are particularly ready to restrain such deceit. *Rushmore* v. *Manhattan etc. Works* (C. C. A. 1908) 163 Fed. 939; *Steiff* v. *Bing* (C. C. A. 1913) 206 Fed. 900; *Mueller Mfg. Co.* v. *McDonaly etc. Co.* (C. C. 1908) 164 Fed. 1001. By the weight of authority in this country fraudulent intent must be proved unless such intent must inevitably be inferred from the facts. See *Sampson Cordage Works* v. *Puritan Cordage Mills* (C. C. A. 1914) 211 Fed. 603; *Hill Bread Co.* v. *Goodrich Baking Co., supra; Elgin Watch Co.* v. *Illinois Co.* (1901) 179 U. S. 665. The better view, however, would seem to be that intent is shown if it may reasonably be inferred from the facts, since the general rule that a man must be presumed to intend the natural and probable consequences of his acts applies to unfair competition as well as to other torts. See *Saxlehner* v. *Appolinaris Co.* (1897) 66 L. J. Ch. 533, 538; 16 Harvard Law Rev. 272, 290; *cf. Rushmore* v. *Manhattan etc. Works, supra.*

TRANSFER TAX—CONTINGENT INTEREST—PAYMENT OF HIGHER RATE.—A testatrix left her residuary estate in trust to pay the income to her son until he attained the age of 21 years, when he was to receive the principal; but if he died before that age the principal was to go to his issue, who were subject to a tax of one per cent, and in default of issue, to persons taxable at the five per cent rate. *Held,* under §§ 222, 230 of the New York Tax Law, the property should be taxed at the five per cent rate. *In re Zborowski's Estate* (N. Y. 1914) 107 N. E. 44.

As to the constitutionality of the statute and the discussion of the question whether the tax is one on property or on the right to inherit, see 3 Columbia Law Rev. 64. It was contended that the change in the definition of the words "estate" and "property", to mean the interest passing to the heirs or legatees instead of the interest of the testator as theretofore was the case, rendered the section relating to the payment of the tax at the higher rate inapplicable. But the court dismissed the argument by reviewing the history of the amendment, and concluded that it was not intended to effect any change in the law as it had previously been interpreted.

WATERS AND WATER COURSES—APPROPRIATION OF WATER—IRRIGATION COMPANIES.—The defendant irrigation company lessened the amount of water which the plaintiff, an annual purchaser, was accustomed to receive. *Held,* the plaintiff was an appropriator, and as such, is entitled to an injunction. *Prosole et al.* v. *Steamboat Canal Co.* (Nev. 1914) 140 Pac. 720.

An appropriation of water consists not merely in its diversion, but also in its application for beneficial purposes. *Morris* v. *Bean* (C. C. 1906) 146 Fed. 423, 426; *Hague* v. *Nephi Irrigation Co.* (1898) 16 Utah 421, 429. When, therefore, water is supplied by an irrigation company to a person who consumes it upon his land, the latter is

generally regarded as the appropriator, and the company is said to make the diversion as his agent. *Wyatt* v. *Larimer etc. Co.* (1893) 18 Colo. 298; *The Albuquerque etc. Co.* v. *Gutierrez* (1900) 10 N. M. 177; see *Slosser* v. *Salt River etc. Co.* (1901) 7 Ariz. 376. In other jurisdictions, notably Idaho, the irrigation company is regarded as the appropriator and the consumer is treated as the agent of the company for the purpose of establishing a beneficial use of the water. 3 Kinney, Irrigation & Water Rights (2nd ed.) § 1477. But even under this rule, by statutory interpretation, the consumer's right to use the water has been held to be perpetual, subject to be defeated only upon default in payment or failure to comply with lawful requirements, *Farmers' etc. Co.* v. *Riverside Irrigation Co.* (1908) 14 Idaho 450, and the customers of an irrigation company are preferred in the order of their priority of user. See *Niday* v. *Barker* (1909) 16 Idaho 73. If, however, an irrigation company is regarded as a public service corporation, the rights of the consumer cannot be worked out on any theory of agency; and any preferences by contract or because of priority must be declared void as unjust discrimination. See *Leavitt* v. *Lassen Irrigation Co.* (1909) 157 Cal. 82; see 10 Columbia Law Rev. 506. The effect, however, in the majority of jurisdictions, whether by statutory interpretation or otherwise, is the same as in the principal case, and establishes the ultimate right to the water in the consumer. 2 Wiel, Water Rights in the Western States (3rd ed.) § 1338.

WITNESSES—PRIVILEGED COMMUNICATIONS—WAIVER.—In an action for personal injuries, the plaintiff testified as to the nature and extent of the injuries, the physician's treatment, and his conversation with him. *Held,* he thereby waived his privilege under § 834 of the Code of Civil Procedure, and the physician's testimony should have been admitted. *McKenney* v. *American Locomotive Co.* (N. Y. 1914) 149 N. Y. Supp. 826.

The purpose of § 834 of the Code is "to enable the patient to disclose to his physician, without danger of exposure, all information necessary for his treatment". See *Edington* v. *Aetna Life Ins. Co.* (1879) 77 N. Y. 563, 571. Since such statutes confer merely a personal privilege, the patient may waive his rights. *Keller* v. *Home Life Ins. Co.* (1902) 95 Mo. App. 627. It would seem that where the patient voluntarily testifies to his physical condition, he has shown his willingness to make the matter public, and so to waive the secrecy imposed by the statute; and to allow him, in such a case, to exclude the unbiased and reliable testimony of the physician, when such exclusion can serve no useful purpose, is most inequitable, 4 Wigmore. Evidence, § 2389. The courts, however, generally refuse to regard such testimony as a waiver, except when suit is brought against the physician for malpractice. *Warsaw* v. *Fisher* (1899) 24 Ind. App. 46; *Lane* v. *Boicourt* (1891) 128 Ind. 420. It is said that by testifying merely to his physical condition he has not "opened the door of the consultation room". *Fox* v. *Union Turnpike Co.* (N. Y. 1901) 59 App. Div. 363; *May* v. *Northern Pac. Ry.* (1905) 32 Mont. 522. The courts have recognized, however, that if in addition to this the patient testifies to the physician's treatment, and their conversation, or permits his physician to do so, so little of secrecy remains that the privilege conferred must be regarded as waived. *Rauh* v. *Deutscher Verein* (N. Y. 1898) 29 App. Div. 483; *Holloway* v. *Kansas City* (1904) 184 Mo. 19; *Patnode* v. *Foote* (N. Y. 1912) 153 App. Div. 494; but see *Warsaw* v. *Fisher, supra.*